Supreme Court, U.S.
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No. 92-905

In The

Supreme Court of the United States

October Term, 1992

MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii Corporation; TSUNG HAI LIN aka THEODORE T. H. LIN and MAY KWONG,

Petitioners,

vs.

PAUAHI ASSOCIATES, a Hawaii General Partnership,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

Points In Reply 2

Conclusion 5

TABLE OF AUTHORITIES

Page

Fuentes v. Shevin, 407 U.S. 67 (1972)..... 5

Lindsey v. Normet, 405 U.S. 56 (1972)..... 5

TABLE OF APPENDICES

Appendix 5: Docket Sheet, District Court, Hawaii, Civil No. H90-2900.....App. 1

Appendix 6: Transcript of Proceedings, August 2, 1990, Civil No. H90-2900.....App. 3

Appendix 7: Transcript of Proceedings, August 29, 1990, Civil No. H90-2900.....App. 8

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PETITIONERS' REPLY BRIEF

Two Opposition Briefs were filed in this proceeding on or about December 24, 1992, much of the contents of which misstates the record below; since the opposition papers present identical argument, this single Reply Brief is submitted by Petitioners to correct the errors presented in both Opposition Briefs, addressing only new arguments therein raised, pursuant to Rule 15.6.

Additional materials are set forth in the Appendix to the Reply Brief, were needed, to document the misstatements in the Opposition Briefs.

POINTS IN REPLY

1. Respondent alleges that the Petition was filed before the Judgment below was final (Resp. Brief, at 1), suggesting that the Petition should not be considered. Respondent is obviously unfamiliar with Rule 13.4, which starts the clock from the judgment and not the mandate. The opinion of the Hawaii Supreme Court challenged was entered on August 26, 1992 (see Petition, App. 5), which does not take into account Respondent's failure to have secured the mandate in a timely manner.

2. Respondent alleges that Mayflower International Company, as well as May Kwong, has no standing, as they were defaulted, supposedly by the state district court at the start of the summary possession proceedings (Resp. Brief, at 1). The Court will note that that issue was not even raised in the State Appeal or considered by the Hawaii Supreme Court in its decision, for the reason, first, that the dual service on Ms. Kwong, who has no facility with English, was considered ineffective, and became irrelevant since not only was she as a guarantor not subject to the subject matter jurisdiction of the state district court due to its dollar limitation, but it was known and established by this very Respondent below that the lease in question had been assigned with the consent of Respondent to Mayflower's corporation, Honsew, which did make an appearance, which has standing to bring this challenge as it was recognized to have had the right to do not only by the Hawaii Supreme Court but also by the state district court that recognized its standing as an approved assignee (see Docket Sheet of state district court, July 9, 1990, and July 16, 1990, Appendix 5; and Transcript of Proceedings before state district court,

August 2, 1990, Appendix 6 highlighting the standing of the assignee Honsew).

3. Respondent and Amicus Curiae allege that the procedures below *did* afford Petitioners "notice and an opportunity to be heard" in a "full blown adversary and evidentiary hearing" and that "the rent trust fund deposits are not a precondition to a trial on the merits" (Resp. Brief, at 2, 3, and 12); A.C. Brief, at 2, 3). The offending Statute, however, provides for no *pre*consideration of offsets or defenses, as the Hawaii Supreme Court in its decision authoritatively determined. It is not sufficient, surely, to merely hold a hearing, when all that can be determined is if the rent has been paid, and Petitioners' counsel even went so far below to beg the state district court merely to hold the deposit hearing and the "subsequent" offset and defenses hearing at the same time, and even that was refused, the state district court, with more candor than Respondent or the Amicus Curiae, explaining that it has no authority to consider *any* substantive defenses unless and until the deposit was made (see Transcript of Proceedings before state district court, August 29, 1990, Appendix 7 to Reply Brief). The trial judge explains that he would not even listen to offset and defense claims *after* the money was deposited since Petitioners had elected a jury trial that meant that issue had to go to a higher trial court, which compounds the constitutional infirmity still further – to punish the tenant who elects his constitutional right to trial by jury.

4. Respondent and Amicus Curiae allege that the lease prevents Petitioners from asking for offsets to rent payments, and even that unfinished premises were not grounds for breach of the lease, presumably as summary

judgment matters, even though not considered that way by the state courts (Resp. Brief, at 4; A.C. Brief, at 3); however, the Hawaii Supreme Court in its decision took none of those issues into consideration; they are factual matters that themselves cannot be determined except by some trial on the merits, even in Hawaii, and when one signs a lease, whether a contract of adhesion or not, there is surely no waiver of fundamental due process rights as to the adjudicatory process that will decide such disputes. For example, Petitioners claim that the leasehold improvements written into the lease should have been reimbursed to them, not as an offset, but as a part of the rent bargained for (see Petition, at 3), and that itself should have been a rent issue to be decided before the deposit was ordered, but was also ignored.

5. Respondent and Amicus Curiae allege that for sound policy reasons States can "treat landlord-tenant matters differently", to protect "the public interest in low-cost rental property" and that to do otherwise here might allow tenants to "remain in possession of the landlord's property for a substantial period of time without paying rents" (Resp. Brief, at 3; A.C. Brief, at 4, 1). Obviously, $22,153.20 per month in rent is not low-income housing (see Petition, App. 2); moreover, since the purpose of state district court summary possession laws is to allow quick adjudication, Respondent fails to explain why instead of proceeding to trial in a few weeks as with most summary possession claims it instead took months to pursue the rent trust fund deposit, at its own procedural election, as the Plaintiff below. If the quickness of remedy were to be a justification for due process violations, the Fifth and Fourteenth Amendments would have

as much vitality as did the individual liberties enshrined within the former Soviet Union's written Constitution.

CONCLUSION

The Hawaii Supreme Court in its August 26, 1992, opinion, was clearly more forthright than the opposition papers here, for it covered the issues with no such *adversarial gloss*, giving a clear interpretation to the Hawaii Rent Trust Fund Statute, holding that "the right to summary possession is distinct from the issue of a tenant's defenses and claims of offsets to claimed rent" (see Petition, App. 9), which is the exact opposite of what this Court in *Fuentes v. Shevin*, 407 U.S. 67, 85 n.15 (1972), felt the need after its prior ruling in *Lindsey v. Normet*, 405 U.S. 56 (1972), to point out.

Respectfully submitted,

GARY VICTOR DUBIN

Counsel for Petitioners

Honolulu, Hawaii
January 4, 1993

APPENDIX 5

DOCKET FILE CIVIL DOCKET
DISTRICT COURT OF THE

NO. H90-2900

FIRST CIRCUIT

DEFENDANT(S):

MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii General Partnership, HONSEW, INC., a Hawaii corporation, TSUNG HAI LIN aka THEODORE T. H. LIN and MAY KWONG and JACKSON PACIFIC JOINT VENTURE dba JACKSON CONTRACTORS, Intervenor

Attorney: LORRAINE H. AKIBA for INTERVENOR
GARY DUBIN for ALL DEFTS (7/16/90)

PLAINTIFF(S):

PAUAHI ASSOCIATES, a Hawaii General Partnership

Attorney: Roy Ogawa #1821

CAUSE OF ACTION: AMOUNT EXHIBIT

ASSUMPSIT
SUMM. POSS. DMGS. $93,720.88 LEASE AGREEMENT

Pauahi Project-Block E, kaa Maunakea Marketplace TMK #1-7-3: 196
DATE FILED 6/28/90
FILING COST 15.00ck
CLERK em

SUMMONS: RETURNED 7/2/90 SERVED ON all: 6/30/90

MAYFLOWER: 3269 Harding Ave., srvd thru May Kwong, V.P.

HONSEW: 3269 Harding Ave., thru May Kwong, V.P.

TSUNG HAI LIN: 3269 Harding Ave. thru his adult roomate, May Kwong residing therein at his normal place of abode since the deft could not be found

MAY KWONG: 3269:Harding Ave.

July 9 Atty Roy Ogawa present for Pltff. Defts called; default noted re MAYFLOWER INTERNATIONAL COMPANY DBA HONSEW, INC., a Hawaii General Partnership and MAY KWONG per Atty Ogawa. Other defts have been reserved & the retble date is 7/16/90 P.M. By order of the crt, case continued to: 7/16/90 P.M. for ANSWER re OTHERS & DISPOSITION re MAYFLOWER INTERNATIONAL & MAY KWONG. Tape RC475; #1-1242. YAMASHITA/csl

July 16 YAMASHITA:KAU: (Tape RC476)
Atty Ogawa for Pltff & Atty Dubin for all Defts present. General Denial Entered for Defts, HONSEW & TSUNG HAI LIN. Case cont for PRE-TRIAL as to HONSEW & TSUNG H. LIN to 7/23/90 at 9:00 AM. Atty Dubin given leave to file written Answer & Counterclaim. Lorraine Akiba present for Intervenor Jackson Contractors – Given leave to file for Intervention.

APPENDIX 6

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

PAUAHI ASSOCIATES, a Hawaii General Partnership, Plaintiff, vs MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii General Partnerhsip, HONSEW, INC. a Hawaii Corporation, TSUNG HAI LIN aka THEODORE T.H. LIN and MAY KWONG, Defendants. and JACKSON PACIFIC JOINT VENTURE DBA JACKSON CONTRACTORS, a Hawaii Registered General Partnership, Intervenor.	Civil No. H90-2900

TRANSCRIPT

of proceedings had before the Honorable Tany S. Hong, Judge Presiding, on Thursday, the 2nd day of August, 1990.

Of Counsel:

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Attorneys for Intervenor.

REPORTED BY:

MARILYNNE J GRILHO CSR#217
Court Reporter
District Court of the First Circuit
State of Hawaii

* * *

BY MR. OGAWA:

Q Mr. Lin, could you state your full legal name for the record?

A Theodore Tsung Hai Lin.

Q And did you officially change your name to Theodore, or is that an alias that you use?

A That's my legal name.

Q Given name?

A It's my all chosen (sic) name. My original name when I emigrate here was Tsung Hai Lin. Then I would become a citizen, so I add American name to it.

Q So your naturalization papers will show Theodore Tsung Hai Lin?

A Correct.

Q What's your date of birth?

A February 8, '57.

Q Mr. Lin, are you a general partner of the defendant Mayflower International Company?

A I was. Well, I guess I got to describe this little bit, because me and my wife May Kwong, we were general partners back in five, six years ago when we first set up Mayflower International. And we incorporate the company to Honsew. The Honsew buys out Mayflower completely. And I own 100% of Honsew, Inc. at that point, and my wife doesn't own anything of the share in the company stock.

Q And what happened to her interest in Mayflower International? Did you buy her out?

A Oh, yes. At that point, yes.

Q Mr. Lin, I'll show you what's been marked and introduced into evidence as plaintiff exhibit 3, which

purports to be an assignment of lease between Mayflower International Company and Honsew, Inc. Now directing your attention to page 2 of the assignment of lease, is that your signature made on behalf of Mayflower International Company?

A Yes.

Q And also referring to the signature under the line Honsew, Inc. on page 2, is that your signature made on behalf of Honsew, Inc.?

A Yes.

Q And did Mayflower International Company assign the Maunakea marketplace lease to Honsew, Inc.?

A Well, when Pauahi Associates prepare the lease, they put two names at the same time on lease, so there wasn't any assignment from Mayflower to Honsew at all, because I believe – what I know, both of them were (sic) appear on the lease.

Q But you signed this assignment of lease, purporting to assign the lease from Mayflower International Company to Honsew, Inc., is that correct?

A Can I see one – this the one here? Well, yes.

Q Are you an officer or director of Honsew, Inc.?

A I am the president.

Q And you're also the 100% stockholder?

A Yes.

Q Who are the other officers and directors for Honsew, Inc?

A That's – my sister in Japan is the vice president. And my sister-in-law in Hong Kong is the secretary.

Q And your wife May Kwong is not an officer or director of Honsew, Inc.?

A No.

Q And where do you presently reside?

A I'm sorry?

Q Where do you presently live?

A I live in 225 Kaiulani Avenue, apartment 1404. Zip code is 96815.

Q Now when we initially attempted to serve the complaint, we served it at the residence of your wife May Kwong. You no longer reside at that residence?

A Well, I move out of the house since more than a year ago, because we were in – weren't in good condition.

REPORTER: I'm sorry. What kind of condition?

A We – I mean the marriage was not in good condition. We were separated.

MR. OGAWA: Okay. Well, I'm not interested in the reason. I apologize, I don't mean to get into that.

Q But that used to be your residence, is that correct?

A Yes.

Q And when did you move out of that residence?

A I believe sometime last year. Around this time last year.

APPENDIX 7

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

HONOLULU DIVISION

STATE OF HAWAII

PAUAHI ASSOCIATES, a Hawaii General Partnership, Plaintiff, vs. MAYFLOWER INTERNATIONAL COMPANY dba HONSEW, INC., a Hawaii General Partnership, HONSEW, INC., a Hawaii corporation, TSUNG HAI LIN, aka THEODORE T. H. LIN, and MAY KWONG, Defendants.	Civil No. H90-2900 Assumpsit, Damages, and Summary Possession (Filed Dec. 31, 1990)

TRANSCRIPT

of the proceedings before the HONORABLE TANY HONG, District Judge, presiding, on Wednesday, August 29, 1990.

APPEARANCES:

DEBBIE JEW, ESQ. — Attorney for Plaintiff
707 Richards Street
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Honolulu, Hawaii 96813

GARY VICTOR DUBIN,
ESQ. Attorney for Defendants
733 Bishop Street
Suite 1915, Grosvenor Center
Honolulu, Hawaii 96813

INDEX

Defendants' witness	Redirect	Recross
Tsung Hai Lin	9	14

* * *

[p. 29] MR. DUBIN: All right. Then, the other issue, Your Honor, is that Section 666-21 of the Hawaii Revised Statutes, Rent Trust Fund, subsection c, does specifically provide that this Court, after the money – I'll wait until the Court gets the Section. Section 666-21(c).

THE COURT: Go ahead.

MR. DUBIN: Does provide that after this Court establishes the money shall be put in the rent trust fund, may specifically grant that money back to the tenant if it finds that the tenant had a basis to withhold, deduct, or, and this is either of two words, of course, otherwise offset or set off, I'm sorry, the rents not paid.

Now, based upon. . . .

(Reporter replenishes steno pad).

MR. DUBIN: We appreciate the fact that [p. 30] this Court did give us an evidentiary hearing where we were able to discuss these issues, although prevented, to some extent, introducing evidence on setoffs that we wanted to.

As the Court knows, I, frankly, find this Section to be constitutionally objectionable for the reason the cases the Hawaii Supreme Court on preliminary injunctions I have cited to the Court. It seems like this Section could be used for the purpose of ameliorating the constitutional problems that exist. And, I would ask the Court to permit us to have a hearing on this issue of offsets, 666-21(c), at the same time that the order would become effective, and to stay the order on the rent trust fund so that we would have the opportunity to present our evidence for setoffs to avoid a situation where any resident of the State, my client or otherwise, who did not have the money to put it up, but who had valid claims under 21 – 666-21(c), would have his day in court. And, as a matter of justice, would have the opportunity to show that he was entitled to the relief in Section 666-21(c).

If the Court were not to grant that request, then – then I feel that the constitutional infirmity of – of this Section would be clear. And, I think the Court has, I think, an obligation for two reasons to grant that request which, in effect, is, again, a stay.

One, because the Court should read – should attempt to read 666-21 in the way that it would be constitutionally [p. 31] consistent with the requirements of the preliminary injunction requirements and constitutional law in this state.

And then, secondly, the special circumstances of this case where, for example, the rent supposedly was not due in February and suit was not even brought until – until, I think, it was in this Court in June, which would suggest that there were special circumstances here.

And, I would, therefore, ask the Court to give us an opportunity to schedule a 666-21(c) hearing prior to the effectiveness of the rent trust fund order.

THE COURT: Miss Jews?

MS. JEW: Your Honor, Mr. Dubin, or I should say the Defendants, do not have either a counterclaim or complaint for offsets in this Court. So, the issue of offsets is not appropriately before this Court.

However, they're not going to be prejudiced because they've already filed those claims in the circuit court, and the issue of any offsets that have to be done, and – and we intend to defend those claims vigorously, should be determined by the circuit court, rather than having several proceedings on the same issue in several – in – in more than one case and in two different courts. That – that does not get to – that does not promote judicial economy.

Mr. Dubin and his clients will have their day to be heard on the offsets in circuit court. They removed those [p. 32] claims up to the circuit court. They have their complaint for declaratory relief up in the circuit court.

The only issue before this Court is what rents are due, what rents haven't been paid, and what should be deposited into the rent trust fund.

MR. DUBIN: Two points, Your Honor. I call your attention to District Court Rule. I believe 12A specifically says that affirmative defenses are maintained in a general denial. So, we have the affirmative defenses. And, the opposition has a list of our affirmative defenses, which – which included setoffs.

Second, the fact that there's a circuit court case pending is not – is not our doing. Now, why did the Supreme Court give my client the right to damages and to a jury trial?

We filed a circuit court action before this action, and it was no rush. I mean, no rush to – to file, and we filed that because of a constitutional right to that.

The scheme that was set up by the legislature on this 666-21, constitutionally or otherwise, forces us and the court and everybody else into a box whether – whether to act. It's not something we created and, certainly, it would be ludicrous to suggest for the reasons that I pointed out of the – of the extraordinary remedy of 666-21.

It would be ludicrous to suggest that any client or anybody in the State, who couldn't put up the money who had [p. 33] valid claims for offsets, could then lose their business or hundred employees out of business, and then wait later on to decide whether they had any damages, especially when one considers the high costs of pursuing a circuit court action.

So, if anything, the reasons presented by Miss Jew convinced me more than ever that 666-21 should be read in this manner, in this case, that we do have an opportunity to ameliorate the effects of that which, of course, would then – would then lead to a less multi – multiplicity. Because if that were done, then, there would be less reason for us to take – to take an appeal which is – which is simply our efforts to try to get the evidence of offsets in.

And, here is – here is a statutory scheme to allow us to do that if the Court would merely dovetail the two together for us.

MS. JEW: Your Honor, the other thing is in the Lease Agreement itself regarding the payment of rentals on Page 4, it also said that rents will be paid without any offsets or deductions. That's the clear language of the agreement between the parties.

MR. DUBIN: Again, Your Honor, that's not relevant, because Section 666-21(c) specifically provides that setoffs are to be taken into account for the rent trust fund.

And, therefore, I – I don't really think that Miss Jew is suggesting that this Lease will nullify that – that [p. 34] provisions of Section 666-21(c), where the legislature says they don't care whether or not the provision may be in there.

MS. JEW: Well, ...

MR. DUBIN: The point is it says you can show – in fact, the legislature said something more significant in 666-21(c). It says that the tenant should have the right to get the money back by showing that he withheld it for a good reason; that he had a basis for withholding.

THE COURT: Well, doesn't that run contrary to your argument? Before he gets it back he had to pay it in.

MR. DUBIN: Well, not necessarily, Your Honor. It depends on the circumstance . . . .

THE COURT: Well, that's what the language clearly implies that before you get it back, you gotta pay it in.

MR. DUBIN: Well, I think it's the order – well, you see, that's the issue. If – if that – if that's what the legislature is demanding, if that's what the court is going to enforce, then we would like to have a constitutional review of that because the fundamental unfairness of that. It has to be obvious to everybody in this room.

You're going to force somebody who has a valid setoff claim by first putting it in. And – and then, if you can't put it in, he never has the right to show that – that he has, in a circumstance like this, where he was financially injured [p. 35] by – by the – by the setoff, to show that he had a valid claim under – under 2 – 666-21(c).

Now, what are we really asking for? It's going to take a little time to prepare the order anyway. The Court has already invested time and listened to – to most – most of the evidence here.

I – I just feel, not only is it – is it appropriate in a case where there is a constitutional question here, but in all fairness it's – what possible delay could come about? It's going to take some time for the order to be signed anyway, and the Court has suggested there might be a couple of weeks before the money is to be put in. By that time – we've gone with such speed here in this Court. I mean, we were told the first week we'd have it, the rent trust fund hearing the second week. If – if we – if the Court continues at speeds at which, I'm not saying that it's – it's prejudiced, this is the way the scheme is set up here by the legislature. If the Court is to continue with the same equality, the speed at which it – it rushes, to protect the – to protect the landlord, to also protect the tenant under Section 666-21(c).

We could probably have two hearings one after another before the order would be signed anyway. Why – why – why should we wait on that technicality?

Certainly, the language does not say that. The language in any – I believe any court could read, especially [p. 36] in these – in the circumstance, that it could almost be done simultaneously. Surely, that's, in my opinion, that's – that's the answer to the constitutional concern.

My client is asking for nothing more than the evidence be heard to make a determination as to what is fair in this case and circumstances in this case. And, in fact, the legislature has provided this under (c). It would be a shame if we never got to (c).

And, certainly, I can't see any prejudice to a – to a landlord who claimed rent is not paid in February, who waited till June to file, and who now has to prepare an order anyway that could take a couple of weeks.

And, as the – as the Court knows, I think the rule here in this Court is as it is in the circuit court, that the order, you know, takes time and the order may not be final. And, we have a right to file a motion for reconsideration anyway, which – which would delay the effect of it. So, there's no game being played here to delay. There's no way that this request of mine would delay anything. It might shorten it because we're not opposed to this Court making this decision.

What we're asking is that we have the full benefit of the wisdom of this Court based upon all – all the evidence.

THE COURT: Well, Mr. Dubin, some of the arguments that you made are very interesting. The argument relating to fundamental unfairness may be true, but I think [p. 37] when you look at the statute and you look at the manner in which this statute was set up, and the law relating to the fact that the damage issue can always be appealed to the circuit court, I think is indicative of the fact that the court and the laws – the legislature's aware of the fact that they have two issues.

One relating to the question of possession, and that issue is an issue that, I think, was set up for the purposes of giving the landlord a quick remedy with respect to possession of the property.

With respect to the issue of setoffs, et cetera, et cetera, although there are – this language in 666-21 relating to the fact that the court may take jurisdiction over the issue of setoffs, it's my opinion that that is a situation where that comes into play, both parties are agreeable to having that issue resolved here in this court. If one of the parties or both of the parties wish to have the matter heard in circuit court, then the matter, I think, should be heard in circuit court.

And, the reason for it is because the issue relating to setoffs, is a much more complicated issue than the issue relating to the question of possession.

Obviously, if we're going to hear the issue of setoffs in this court, in a – in a – in a few weeks, then, what's going to happen is that one or both parties may be [p. 38] disadvantaged because they won't have the advantages you have in a big lawsuit involving a lot of money in the

circuit court where you have time in which to be able to depose the parties, et cetera, et cetera.

In this case, because of the shortness of time, the discovery process is not really available. And, if that's true, then I think we're running into a real big problem as to the fairness of proceeding on a complicated issue without giving one or both parties the opportunity to be able to prepare the defenses to that issue, Mr. Dubin, especially when one party is not agreeable to – to hearing that issue.

MR. DUBIN: I think there's some confusion, Your Honor. I'd like to point out two confusions. I – I understand what Your Honor is saying.

Let me first point out in *Lum v. Sun*, a Hawaii Supreme Court case, they were talking not about the rent trust fund. That's what we're talking about, setoffs here.

THE COURT: That is correct.

MR. DUBIN: They were talking about the fact that you can go try the damages in circuit court; you're staying here in possession. I think that you – there may be some confusion in suggesting that that tells us anything about the argument that I was making with Miss Jew, because it really doesn't.

Because here, specifically, as far as the rent trust [p. 39] fund is concerned, there is a provision in the statute that says we can consider setoffs. So, whereas what the Court said about this – this distinction in terms of the treatment of the case, possession versus damages, well, that may be true. In *Lum v. Sun*, that – that was really not – not the issue.

And, secondly, I think the Court may be misreading, to some extent, *Lum v. Sun* because – because the issue – the Court did not say in that case that you couldn't bring up the issue of setoff in the possession suit, because after all, the only thing that the landlord is saying is you haven't paid me the money.

Now, if you can show that the landlord owes you money, that's not the issue of damages for purpose of – of this circuit court suit. That's still between the parties on the – on the issue – on the issue of rent.

And, in fact, the Lum Court, as I recall at the conclusion of it, pointed out that the damage issue in the circuit court was not moot because of what happened – because of the – of the possession issue in the – in the district court.

So, I don't read *Lum* at all to suggest that we can't raise the issue of setoff. And, I think if the Court barred our evidence based upon setoff, which I thought the Court was doing based upon 666-21, if the Court barred our evidence regarding setoff based upon *Lum*, I would ask the Court [p. 40] to allow me a few days to brief that issue, and specifically *Lum v. Sun*, because I think the Court would find that contrary as stated in *Lum v. Sun*. And, I think if I got the record of that case as to what actually happened in this Court, in the district court, it would be clear. Because having that record, the Hawaii Supreme Court pointed out that the issue is rendered moot is by the District Court's ruling on *Lum* summary possession's claim. That, in fact, I believe that because of – of the – of Chapter 666, it forces the parties into arguing

the same thing. It forces the parties into arguing setoff. Not as – not as on the issue of damages.

But, what is protected under – under Hawaii District Court Rule 12A, which has the force of statutory law in this State, as an affirmative defense. An affirmative defense, of course, is different than a counterclaim.

So, I don't think – I don't think that's what the Court said at all in *Lum*. And – and, I'm sure it's not clear in *Lum*, but I think from the language of it, it would have to be in our favor because they rule that the circuit court damage suit was moot.

And, I think that's the box that the court would be forcing us into, because if the Court, on the basis of we won't listen to setoff, decided that summary possession should, and that's a different issue than the rent trust fund, of course, summary possession should go to the Plaintiff in this case, [p. 41] and then we were to appeal, then, I presume the Hawaii Supreme Court will tell me the same thing it told the other party when it said that – that the *Sun's* claim is rendered moot by the district court ruling.

MS. JEW: Your Honor, the circuit court case in this case is not moot. There's a complaint requesting damages based on all the allegations of offsets in the circuit court. Mr. Lin and the defendants will not be deprived of their day in court on those issues.

The issue here is the amount of rent which has to be paid. Even Mr. Lin testified that with the signing of the lease, even if the premises were not ready, he would have to pay rent. That was his testimony. That's also reflected

in the Lease Agreement, Section 3, Paragraph F. That there is a recognition that there is construction ongoing. And, that rent all – the landlord shall not be subject to any liability for the failure to give possession on the date.

For that matter, it's – it's both the agreements of the party and acknowledgement by the defendant that rent had to be paid.

And, the issue of offsets was specifically removed by the same defendant who filed the complaint in the circuit court as plaintiffs asking for offsets. They're asking – they're going to be – if – if they're allowed to ask for offsets here, it's going to be putting an issue that's before [p. 42] the court either by a complaint or counterclaim by these defendants. It's also going to promote several proceedings on the same issue.

And, what may end up happening is you're going to have all these diverse rulings which would create more confusion.

They moved the – the issue to circuit court. They filed the complaint in circuit court. That's where the issue should be tried.

MR. DUBIN: Your Honor, can I point out that we – we had to file in circuit court because, not only is there a jurisdictional limitation here, but our complaint in circuit court is for declaratory judgment. And, think – think – think of the folly of this were in circuit court asking for declaratory judgment that the Lease is unconscionable as to these provisions, whereby this Court – this Court is – presumably could proceed to – on the basis that, no, you can't look at setoff or anything else that

happened. This Court goes ahead and gives possession, and then the complaint for declaratory judgment is then, obviously, moot.

MR. JEW: No, Your Honor. The – although the complaint is labeled for declaratory judgment, there are several counts. Some sounding in breach of contracts, some in tort, and requesting damages. So, it's a little bit simplistic to say that it's just a complaint for declaratory action just because it's labeled.

[p. 43] We have to look at the substance of the complaint over the form. And, the request for offsets is specifically in that complaint for declaratory judgment, which includes other relief, and that's where the case should be tried with respect to the offsets.

MR. DUBIN: If I list for one example in our complaint in circuit court, we ask for a judicial declaration that Honsew is not in default of the Lease, and the guarantees, and the rent provisions. Now, ...

THE COURT: All right. Mr. Dubin, Miss Jew, I think I've heard enough. Mr. Lin, I'm really sorry. There's a lot at stake for you. I understand that. Your entire business, your entire career is at stake. But, my job is to call it the way I see it, Mr. Lin.

And, I see the statute as requiring you to make payments into the rent trust fund. It's only when the question arises as to payments out of the rent trust fund, the issue of setoffs come into play.

I don't hear the Plaintiff in this case asking for payments out of the rent trust fund. It goes into the rent trust fund.

Secondly, there's some question as to whether or not the Plaintiff in this case wants to hear the issue of setoffs in this case. And, my ruling is that if both parties – one of the parties do not wish to hear the issue of setoffs [p. 44] in this case, then the Court is not going to hear the issue of setoffs. It's going to go into the rent trust fund, payments anyway. And, the issue of damages has to be decided in the circuit court.

Your attorney has raised some issues relating to the constitutionality of sections like that because it forecloses you from being able to raise defenses that you may have as to the payments that you're supposed to make in this case.

Now there's some question as to whether or not he can appeal from my decision. But, there are other ways that he can go to the supreme court to stop me from doing what I'm doing. And, I'm pretty sure that your attorney is smart enough to be able to decide how to do that. It may be by way of a Writ of Prohibition, or something like that, to the supreme court to prevent, or to raise the issue as to whether or not this statute and the way the Court is construing the statute may be unconstitutional.

And, because he doesn't have a way to get to the Court, he may have another way of getting into the court. But, that's for your attorney to make a determination.

But, as far as I'm concerned, the Court's order stands. You have to make payment. One payment by the first of September. That's for the September rent. The balance has to be made by the 15th.

So, if your attorney can fashion something up in a [p. 45] short period of time, that may stop me from being able to enforce my order. But, that's entirely up to your attorney, Mr. Lin. But, I'm sorry. I have to call it the way I see it, and that's the way I see it, Mr. Lin.

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